In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-542

PRINCE WILLIAM HOSPITAL CORPORATION, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-15a) is reported at 503 F.2d 282. The opinion of the district court (Pet. App. B, pp. 16a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1974. The petition for a writ of certiorari was filed on November 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that female nurse aides and male orderlies in a hospital were entitled to equal pay under the equal pay provisions of the Fair Labor Standards Act because, despite minor variations in their duties, they performed substantially equal work.

STATEMENT

The Secretary of Labor sued to enjoin petitioner from violating the equal pay provisions of the Fair Labor Standards Act (29 U.S.C. 206(d)) by paying female nurse aides less than male orderlies. Petitioner denied that the aides and orderlies performed equal work, claiming that the orderlies were assigned certain additional duties which required greater skill, effort and responsibility. The district court held that because certain work was required of each group that the other group was neither required nor permitted to do, the work was not "substantially equal," and dismissed the Secretary's suit (Pet. App. B, p. 19a). The court of appeals reversed, noting that the facts were not disputed, and ruling that the district court had given undue weight to the relatively minor differences in described duties (Pet. App. A, p. 2a).

1. Petitioner operates a general hospital. Its aides and floor orderlies are each assigned a certain number of patients. The trial court found that they "[b]oth have the same patient care duties and responsibilities except that the orderlies are usually assigned male patients [and] do not care for infants and children" (Pet. App. B, p. 17a). The time they spend on particular duties may vary between aides and orderlies and among members of each group, depending on their shifts, experience and other factors. These duties encompass a wide variety of supportive services, including, for example, bedmaking, answering calls, bringing and emptying bed pans, feeding patients, taking vital signs, collecting specimens, cleaning incontinent patients, assisting with the admission and discharge of patients, housekeeping, equipment care and supply work.

Other tasks, alleged to differ between the two groups (see Pet. App. A, p. 9a; Pet. 7-11), include performing surgical preps; restraining combative or hysterical patients; obtaining and setting up orthopedic equipment; assisting in the emergency room and other hospital areas; lifting or assisting heavy or helpless patients; and performing catheterizations. Although petitioner contends that the aides almost never performed these duties, Exhibit 26 (prepared by petitioner and reproduced in the petition as Appendix E)[1] shows that aides performed most of these duties with approximately the same degree of frequency as orderlies and that most such tasks were performed infrequently. See n. 1, *supra*, and categories .064-.067; .079-.083; .022-.026.

The only duty which orderlies but not aides performed was male catheterization, and this distinction was made for reasons of modesty (Pet. App. A, p. 13a). This work, however, constituted only a minute part of their total duties. It was done on the average only .233 times a day by orderlies. Moreover, the record indicates that this

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[1]This exhibit was derived from diaries of work performed by three orderlies over 10 working days (30 sheets) and 42 aides over varying numbers of days (364 sheets). The work done was then categorized into 123 categories. See petitioner's brief in the court of appeals, pp. 33-34. The decimal figures under each group are not percentages. They indicate the average number of times per work day the worker performed each task. Thus, work involving traction, items .076-.078, was performed .066 times per day by orderlies (about once in 15 days) and .149 times by aides (about once in seven days). For items .051-.054, involving catheters, the comparable figures are .4 for orderlies and .238 for aides. The total number of tasks performed per day was about 102 for aides and 66 for orderlies. Exhibit 26 does not show the difference in skill, effort and responsiblity required for the several duties. The headings of Groups I through IV were added by petitioner's counsel after the trial and were stricken from Exhibit 26 by order of Judge Lewis (App. A to this brief).

work is a relatively routine task (A. 75; Def's Exh. 11, p. 4; A Guide for Assigning Responsibilities to Nursing Service Personnel, Virginia State Board of Examiners, May 1969).

ARGUMENT

1. The court of appeals correctly ruled — in accord with every other court of appeals that has considered the question — that the work of men and women employees need be only "substantially" equal to be "equal work" under the Act (Pet. App. A, pp. 2a, 15a). *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (C.A. 3), certiorari denied, 398 U.S. 905; *Shultz* v. *American Can Co.—Dixie Products*, 424 F.2d 356 (C.A. 8); *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490 (C.A. 4); *Hodgson* v. *Brookhaven General Hospital*, 436 F.2d 719, opinion after remand, 470 F.2d 729 (C.A. 5); cf. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 203, n. 24.

Petitioner contends, however, that these decisions rest upon a misinterpretation of the legislative history of the equal pay provisions of the Fair Labor Standards Act and that that history shows that Congress, when it required equal pay for "equal work," intended the word "equal" to mean "substantially identical" (Pet. 2, 17, 25). To the contrary, we submit that those courts properly interpreted the legislative history as reflecting an intention to provide equal pay for men and women as long as their work was "substantially" equal.

Congress intended the Act's equal pay provisions to apply where men and women are employed in the same or closely related jobs and do "substantially the same work" (Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on Equal Pay Act, H.R. 3861 and Related Bills, 88th Cong., 1st Sess., p. 240). Thus, Senator McNamara, Chairman of the Senate Labor Subcommittee and sponsor of the

Senate bill, noted that part of the House discussion would support the interpretation that only "identical" jobs were covered. He then stated: "[It] is most important that the Senate intent be made clear as to language in the bill which is the same in both the Senate and House versions," since "[t]he discussion that surrounded the congressional consideration of this bill has somewhat clouded the question of the definition of 'equal skills, efforts, and responsibilities'" (109 Cong. Rec. 9761). He stated that the Senate Report "makes it clear that it is not the intent of the Senate that jobs must be identical. * * * Based on some of the discussion which has taken place, these jobs [which involve equal skills, efforts and responsibilities] would not be considered equal because they are not identical, and such a conclusion would be obviously ridiculous" (*ibid.*).

Petitioner argues (Pet. 18-23) that this explanation by one of the bill's sponsors, together with the entire Senate debate, must be disregarded since the Senate bill was "scrapped" for "a completely different House-passed version" (Pet. 18-19). This is incorrect. S. 1409, the bill which passed the Senate, and H.R. 6060, whose text was substituted for it by the House,[2] are almost identical. The only differences between the two bills (set forth in full at 109 Cong. Rec. 9217-9218) are on matters irrelevant to the issues in this case.[3] In accepting the House version, the Senate was not "capitulating" in any sense of the word, as petitioner suggests (Pet. 19, 21), but simply agreeing to it.

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[2]Petitioner is in error when it states that Senator McNamara "sponsored S. 4609" (Pet. 21). His bill was S. 1409, as indicated in the text.

[3]Section 3 of the House substitute added language forbidding union attempts to cause an employer to violate the Act. It also stated that pay differentials caused by a merit, seniority, or piecework system did not violate the Act. The Senate bill contained only a section, retained in the House version, permitting any differential "based on any factor * * * other than sex."

2. The court of appeals correctly held that, despite some minor variations in the work performed by female nurse aides and male orderlies in petitioner's hospital, their work was substantially equal. The district court found that the aides and orderlies "have the same patient care duties and responsibilities except that the orderlies are usually assigned male patients" (Pet. App. B, p. 17a), and the court of appeals ruled that the minor variations between the work done by the two categories "do not affect the substantial equality of their overall work" (Pet. App. A, p. 15a).

The fact that the orderlies are usually assigned to male patients and do not care for infants and children does not undermine the conclusion that they perform substantially the same work as the female nurse aides. The critical focus is upon the work which they perfom and not upon the persons for whom they perform it. The orderlies and the nurse aides perform substantially the same work, even though the former perform it mainly for male patients.

Contrary to petitioner's contention (Pet. 13-16), the decision below does not conflict with *Hodgson* v. *Golden Isles Nursing Convalescent Homes, Inc.*, 468 F.2d 1256 (C.A. 5), on the issue whether female aides and male orderlies perform equal work. In the *Golden Isles* case, the court held that male orderlies at a geriatric nursing home did not perform work substantially identical to that of the female aides, based on the facts of the particular case, "primarily" that the male orderlies were required to transport heavy oxygen tanks, which the female aides could not do. See Pet. App. C, p. 23a; Pet. App. A, p. 10a, n. 7. The different results in the present case and *Golden Isles* reflect the differences between the work performed by the female and male attend-

ants in the two cases. Indeed, the Fifth Circuit in its subsequent decision in *Hodgson* v. *Brookhaven General Hospital*, 470 F.2d 729, in holding that female hospital aides and male orderlies performed equal work, distinguished its earlier *Golden Isles* decision on that factual ground. There is thus no conflict among the circuits on the proposition that, where the female and male hospital attendants perform substantially equal work, they are entitled to equal pay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
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HELEN W. JUDD,
Attorneys,
Department of Labor.

FEBRUARY 1975.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JAMES D. HODGSON,
Secretary of Labor, etc.,

Plaintiff

CIVIL ACTION NO. 10-72-A

vs.

USCA No. 73-2331

PRINCE WILLIAM HOSPITAL
CORPORATION,

Defendant

AMENDED ORDER PURSUANT TO RULE 10(e) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

This case having been reached for trial on July 25, 1972, at the conclusion of which the Court requested briefs and additional exhibits or charts comparing, on the basis of evidence received at trial, the duties and responsibilites of the female nurse aides and male orderlies, and the Court having entered on December 20, 1973, at defendant's request made pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, an order permitting certain post-trial exhibits tendered by the defendant to be made a part of the record, and the plaintiff having objected to the entry of said order on the ground, among others, that certain of defendant's post-trial exhibits were based on information outside the record, NOW, THEREFORE, upon the joint motion of plaintiff and defendant, the Court hereby amends its order of December 20, 1973, in the following respects:

(1) By striking from the record defendant's post-trial Exhibits 23 and 24.

(2) By admitting as part of the record defendant's charts, denominated Exhibits 26 through 29, on the condition that all footnotes and headings characterizing the degree of skill required in the performance of the enumerated duties be stricken, and

(3) By admitting as part of the record plaintiff's chart, denominated as Appendix A to his post-trial brief.

This order is entered pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, the case now being on appeal to the United States Court of Appeals for the Fourth Circuit, on this the 22nd day of March, 1974.

(signed) Oren R. Lewis
United States District Judge

Seen and approved:

(signed) Carin Ann Clauss
Carin Ann Clauss
Associate Solicitor
U.S. Department of Labor

B. P. Gettings
United States Attorney

By
By (signed) David H. Hopkins

(signed) John K. Pickens
John K. Pickens
Attorney for Prince William Hospital

A True Copy, Teste:
W. Farley Power, Jr., Clerk

By (signed) Betty McFadden
Deputy Clerk